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FARM CREDIT ADMINISTRATION
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SUMMARY OF CASES

RELATING TO

FARMERS' COOPERATIVE ASSOCIATIONS

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Fair Labor Standards Act

In Dallum v. Farmers Co-operative Trucking Association, 46 F. Supp. 785, two former employees of the trucking association brought suit against it "to recover overtime compensation and liquidated damages" under the Fair Labor Standards Act of 1938, 29 U.S.C.A., Section 201, et seq. The court in giving the facts stated that:

> The plaintiffs, at the times set out in the complaint herein, were employed by the defendant as truck driver and helper. The defendant is a co-operative trucking association, organized under the laws of the State of Minnesota, with its principal place of business at Wadena, Minnesota, and a membership of creameries and produce companies located in that vicinity.
>
> During the period with which we are concerned, butter, eggs and farm products were picked up and gathered by the defendant's trucks at the different member creameries, and these commodities were then transported to Wadena, Minnesota, where the loads were reassembled and moved on to St. Paul, Minneapolis or Duluth, at which destination the shipments were unloaded at either railroad or steamship company docks, or at the dock of another motor carrier. No provision in the contracts of carriage for member creameries to St. Paul, Minneapolis and Duluth was made for a continuation of the haul across state lines. It was known to the plaintiffs and all interested in the movement of said commodities that the same were to go forward in interstate commerce. The contract issued by the defendant covered the local haul only, and carriage charges were made by it for that part of the haul. When the defendant made delivery of the commodities to railroad, steamship company or forwarder, a bill of lading was issued by such carrier to the interstate destination.

The trucking association contended it was exempt from the operation of the Fair Labor Standards Act relating to maximum hours. Section 213 (b) (1) of the Fair Labor Standards Act provides that:

> The provisions of section 207 [of this title] shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 304 of Title 49.

Section 207 just referred to relates to compensation for hours worked in excess of the hours specified in the statute.

> The provisions of the Motor Carrier Act, 49 U.S.C.A. § 302, "apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce * * *."

The court said:

> The question presented is, were the plaintiffs engaged in the operation of a motor truck used in the transportation of goods in interstate commerce. If they were so engaged, then the Fair Labor Standards Act would have no application to the maximum hours of service. On the other hand, if the goods which the trucks hauled were not shipments in interstate commerce, the Fair Labor Standards Act would, in all respects, govern the employment of the plaintiffs.

The court discussed the various types of transportation in which the employees of the trucking association had engaged. It appeared that all the shipments, except shipments of butter to the plant of the National Butter Company at St. Paul, Minnesota, involved the transportation of commodities which were destined for transportation out of the State of Minnesota. It is true that in no instance did the trucking association transport commodities outside of the State of Minnesota, but the consignors of shippers of the commodities, except as noted above, intended that the commodities would be moved outside of the State. In this connection the court said:

> The intention of the original shipper to move these goods across state lines to definite interstate destinations is established in the evidence by the shipping directions issued in connection with each shipment. The movements of the goods by the defendant and other carriers was done in the performance of a preconceived intention to transport said goods to interstate destinations. There was a practical continuity in the movements.

* * * * * * * * * * * * * * * * * * * *

> The fact that several carriers participated in the movement, that different modes of transportation were used, and that rebilling from intermediate points was required, does not destroy the continuity of movement, nor does it destroy its interstate character.

The court therefore held that all of the transportation involved, except with respect to the butter that was transported to the National Butter Company at St. Paul, Minnesota, was intended for interstate shipment and that, therefore, "the plaintiff's employment was of a nature which involves safety of operation." In this connection the court cited the case of United States v. American Trucking Associations, 310 U. S. 534, 60 S. Ct. 1032, 84 L. Ed. 1342, in which the Supreme Court held that the jurisdiction of the Interstate Commerce Commission over employees, as that term is used in Section 204 (a) (1) and (2) of the Federal Motor Carrier Act "is limited to those employees whose activities affect the safety of operation. The Commission has no jurisdiction to regulate the qualifications or hours of service of any other." In other words, the Fair Labor Standards Act in proper cases is applicable to all employees other than "those employees whose activities affect the safety of operation."

The court in the instant case found it unnecessary to determine whether the trucking association was exempt as an agricultural trucking association from the Federal Motor Carrier Act of 1935, because it was clearly subject to that Act with respect to "safety of operation", which is not covered by the exemption. In regard to the butter delivered to the National Butter Company, the court held that the transportation services involved were subject to the Fair Labor Standards Act. In this connection the court said:

> The purchase of butter by the National Butter Company subsequent to February 1, 1940, was not in response to any particular previous requisition therefor. It cannot be successfully maintained that local drayage service constitutes a part of interstate commerce, where there is no intention on the part of the original consignor, the trucker or the consignee, to continue the transportation beyond state lines. It is my opinion that it must be held that this butter came to rest at the plant of the National Butter Company at St. Paul, Minnesota, there to await the demands of customers of said Company. In such a situation, the haul of the butter to the distribution

> plant in St. Paul would be commerce entirely within the state, and the services rendered by the plaintiffs in connection with such transportation would be covered by the Fair Labor Standards Act of 1938.

The trucking association "was authorized by the Railroad and Warehouse Commission of Minnesota to operate as an intrastate carrier. It had no authority, either from the State or from the Interstate Commerce Commission, to operate as an interstate carrier." Under the law, although trucks are operated only within the boundaries of a State they are subject to regulation by the Interstate Commerce Commission under the Federal Motor Carrier Act, if they transport commodities which are destined for shipment out of the State, and it is immaterial that the transportation across a state line is by another carrier.

Of course, if an association is exempt from the Federal Motor Carrier Act, except with respect to "qualifications and maximum hours of service of employees and safety of operation or standards of equipment," no special consent or authorization from the Interstate Commerce Commission is necessary to enable it to engage in business, but on the other hand, if an association is not exempt and is a common or contract carrier, it is, if carrying goods in interstate commerce, subject to that Act. This means that an association, although operating solely within a State, if a common carrier may, among other things, be required to obtain a certificate of "public convenience and necessity" from the Interstate Commerce Commission to authorize it to operate, insofar as interstate commerce is concerned, unless that Commission finds that its operations do not "affect or impair uniform regulation by the Commission of transportation by motor carriers engaged in interstate or foreign commerce in effectuating the national transportation policy declared in the Interstate Commerce Act." In 1940 the Interstate Commerce Commission issued safety regulations applicable to private carriers (23 M.C.C. 1).

Every operator of a truck, cooperative or otherwise, should have his status determined under the Federal Motor Carrier Act of 1935 and for this purpose communications should be addressed to the Interstate Commerce Commission, Washington, D. C., or one of the branch offices of the Commission.

Again, every operator of a truck, cooperative or otherwise, should have his status determined under the Fair Labor Standards Act of 1938 and the fact that an operator may be "unable" to determine whether an employee is covered by that Act will not relieve the operator from liability thereunder to pay unpaid minimum wages or unpaid overtime compensation, as determined thereby and an additional equal amount as liquidated damages.

And in the case of Overnight Motor Co. v. Missel, 316 U.S. 572, a rate clerk of the Company, which operated trucks in interstate commerce, was held entitled to recover such amounts, under the Fair Labor Standards Act. As pointed out above, the employees of the cooperative in the instant case likewise effected such recoveries, insofar as their work involved intrastate commerce. However, there is no discussion in the opinion of the fact that the Fair Labor Standards Act is applicable only to employees engaged in interstate commerce. The basis on which the employees were considered eligible to recover in the intrastate transactions is not disclosed. In contrast with this holding, in the case of Walling v. Jacksonville Paper Company, 63 S. Ct. 332, involving a wholesaler in Florida who received his goods from other States but who sold only in Florida, the court said relative to the Fair Labor Standards Act:

> * * * we cannot conclude that all phases of a wholesale business selling intrastate are covered by the Act solely because it makes its purchases interstate. The use of the words "in commerce" entails an analysis of the various types of transactions and the particular course of business along the lines we have indicated.
>
> * * * The applicability of the Act is dependent on the character of the employees' work. Kirschbaum Co. v. Walling, supra, 316 U.S. page 524, 62 S. Ct. 1120, 86 L. Ed. 1638. If a substantial part of an employee's activities related to goods whose movement in the channels of interstate commerce was established by the test we have described, he is covered by the Act. * * *

Thus the Supreme Court pointed out that some employees of an employer might be under the Fair Labor Standards Act, while other employees of the same employer might not be subject to the Act, depending on the character of the employees' work with respect to interstate commerce. Under the test referred to in the quotation, if goods received from other States came to rest at a wholesale house in Florida for sale to Florida customers and it was not definitely known who those customers would be, at least the employees concerned only with such sales would apparently not be under the Fair Labor Standards Act.

It should be clearly kept in mind that all employees of a concern engaged in the business of trucking in interstate commerce, including all cooperative trucking associations, whether exempt or nonexempt, whose duties effect safety of operation, are under the jurisdiction of the Interstate Commerce Commission, but all other employees of any such concern or cooperative are subject to the provisions of the Fair Labor Standards Act.

In regard to the Fair Labor Standards Act, communications should be addressed to the Department of Labor, or one of its branch offices.

Auto Mutual Indemnity Company became insolvent and the Superintendent of Insurance of the State of New York became its statutory liquidator. In the proceedings which he instituted in New York, the State in which the Company was incorporated, the court held that each member of the Company "during the year prior to November 10, 1937, should pay assessments in specified amounts aggregating 40 percent of premiums earned by the Company during that year." In these proceedings the members were called upon to show cause, on or before a certain date, why the Superintendent should not have judgment for such assessments. Pursuant to the New York Statute and the order of the court, each policyholder was mailed a notice of the proceedings. The Company had a number of policyholders in the State of Georgia, none of whom were personally served in the New York suit. The New York Superintendent of Insurance filed a suit in Georgia against them to recover assessments in the amounts determined in the New York proceedings.

The defendants demurred to the petition which was filed against them and the trial court sustained the demurrer. On appeal to the Supreme Court of Georgia, Pink v. A. A. A. Highway Express, 13 S. E. 2d 337, the court held that the proceedings in the New York court did not bar the policyholders in Georgia from defending the suit brought against them on the ground that they were not members of the Company. It was urged on behalf of the Superintendent of Insurance that to deny the element of conclusiveness to the decree of the New York court upon the question of the liability of each of the defendants to assessments would be to refuse to give effect to the full-faith and credit clause of the Constitution of the United States. But the court said "The answer to that contention is, that before that constitutional provision can become operative one must have had his day in court; and over against it we place the other guaranty, to wit, the due-process clause; and it is of the essence of due process that one must be given an opportunity to be heard." On the affirmance by the Supreme Court of Georgia of the judgment of the trial court, the case was carried to the Supreme Court of the United States. Pink v. A. A. A. Highway Express 314 U. S. 201. That court held that the proceedings in the New York case were not conclusive on the question of the liability of the policyholders of the Company in Georgia and affirmed the opinion of the Supreme Court of Georgia. In doing so the court said in part:

Each policy provided that the insured agrees that it "embodies all agreements existing between himself and the company or any of its agents relating to this insurance." Printed on the back of each policy but not referred to in the contract was a "Notice to policyholders" that "the insured is hereby notified that by virtue of this policy he is a member of the Auto Mutual Indemnity Company," and that "the contingent liability of the named insured under this policy shall be limited to one year from the expiration or cancellation hereof and shall not exceed the limits provided by the Insurance Law of the State of New York," there being on the face of the policy no reference to any contingent liability or assessment or to any law providing for such.

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It is evident that if the constitutional authority of the Indemnity Company to stand in judgment for its absent members turns on their consent or their assumption of membership in the Company, respondents, who were not parties to the New York proceedings, may defend on the ground that they never became members because they have done no act signifying such consent or assumption. After an assessment has been lawfully levied on the members of a corporation, it is still open to any who were not parties to the assessment proceeding to defend on the ground that they never became stockholders. Great Western Telegraph Co. v. Purdy, 162 U. S. 329, 336-37; Coe v. Armour Fertilizer Works, 237 U. S. 413, 423; Royal Arcanum v. Green, 237 U. S. 531, 544; Chandler v. Peketz, 297 U. S. 609, 611; cf. Hawkins v. Glenn, 131 U.S. 319, 335. Ordinarilythis means no more than that they have not acquired or owned stock in the corporation during the relevant period. For a necessary consequence of becoming a stockholder is the assumption of those obligations which, by the laws governing the organization and management of the corporation, attach to stock ownership.

Other considerations may be significant in determining whether a membership in a mutual insurance company has been effected through acquisition of a policy. A mere contract is not a share of stock and when made with a corporation or association does not necessarily

> connote membership in it. A policy of insurance may be a contract whose terms purport to define completely the relationship and obligations of the parties. Here the policy, which was on its face a contract and nothing more, stipulated only for obligations to be performed by the insurer upon payment of the prescribed premium. The policy's stipulations contained no provision making the insured a member of the association or subjecting him to liability for assessment as such. Although the company was denominated "mutual," that term does not necessarily signify that policyholders are members or subject to assessment.

As pointed out above, the policies of insurance did not contain any provisions which purported to make the holders of such policies members. It was held that the statement appearing on the back of each policy to the effect that each policyholder was a member of the company did not operate to cause such policyholders to be members. Undoubtedly this statement would have been regarded as an offer of membership and if a policyholder in some affirmative way had accepted this offer either formally or by doing some act, or asserting some right that was only consistent with membership, such as voting in a meeting of the company, he would have been held to be a member. In this connection the Supreme Court said that these policyholders could defend the suit brought against them "on the ground that they never became members because they have done no act signifying such consent or assumption" of membership.

A person cannot be made a member or stockholder of a corporation without his consent. 18 C.J.S., Corporations, Section 478. There is no way by which at common law a person may be made a member of a corporation by fiat, announcement, or declaration alone, without assent or its equivalent by the person involved. Membership is a result of a contract. 12 Fletcher Cyclopedia Corporations Permanent Ed., Sec. 5688. To make a contract there must be an offer and an acceptance. In the case of Prescott v. Jones, 69 N. H. 305, 41 A. 352, it was said:

> it is well settled that "a party cannot, by the wording of his offer, turn the absence of communication of acceptance into an acceptance, and compel the recipient of his offer to refuse it at the peril of being held to have accepted it." Clark, Cont. 31, 32. "A person is under no obligation to do or say anything concerning a proposition which he does not choose to accept. There must be actual acceptance

or there is no contract." More v. Insurance Co., 130 N. Y. 537, 547, 29 N. E. 757, 759. And to constitute acceptance "there must be words, written or spoken, or some other overt act." Bish. Cont. § 183, and authorities cited.

In some instances cooperative associations include in their bylaws a provision to the effect that all who deal with the association thereby become members thereof. It should be remembered that strangers having no knowledge of bylaws are not at common law, bound thereby. McKinney v. Mechanics' Trust & Savings Bank, 222 Ky. 264, 300 S. W. 631. Ordinarily, such a bylaw would not amount to more than an offer of membership which, if brought to the attention of a person who did any act or thing which could properly be regarded as an acceptance of the offer would result in membership. See: Harley v. Hartford Fruit Growers' & Farmers' Exchange, 216 Mich. 146, 184 N. W. 507.

In at least two states, South Carolina and Arkansas (Acts of Arkansas, 1939, p. 21, Acts of South Carolina, 1937, p. 540), penal statutes have been enacted to the effect that the endorsement by a person of a "draft or check containing conditions which purport to make a person a member of a cotton cooperative association, as a prerequisite to obtaining money, on any draft or check given to him for any cotton which he has sold or pledged to any cotton cooperative association shall not be construed as making such person a member of the association." The statutes further provide that membership may be obtained only by the execution of a membership contract in duplicate. Of course, the fact that the statutes just referred to were enacted is some evidence that prior to their enactment persons could be made members in the manner in question.

In Producers Livestock Marketing Association of Salt Lake City v. Commissioner of Internal Revenue, 45 B.T.A. _____, it was held that persons who were not stockholders in a stock cooperative were not members. See: Summary of Cases relating to Farmers' Cooperative Associations, No. 15, page 24. In two California cases, Sun-Maid Raisin Growers of California v. Paul A. Mosesian & Son, Inc., 90 Cal. App. 1, 265 P. 828: Sun-Maid Raisin Growers of California v. K. Arakelian, Inc., 90 Cal. App. 10, 265 P. 832, it appeared that provisions were made in the marketing contracts of a cooperative for their assignment, but the contracts specified no procedure by which the growers concerned could become members of the cooperative, to which the contracts might be assigned. In suits which were brought on the marketing

contracts by a cooperative, to which such contracts were assigned, it was held that the association could not recover stipulated damages because the growers were not members. If the growers in their marketing contracts had offered to become members of any cooperative association, to which their marketing contracts might be assigned, such an association on receiving an assignment of the contracts could have accepted their offer and thus they could have been made members.

Membership in a corporation, cooperative or otherwise, does not result from one sided action, but only from informed action by the corporation and by the person involved and the meeting of applicable statutory, charter or bylaw provisions.

Money Received as Capital is Not Income*

The Sixteenth Amendment to the Constitution of the United States reads as follows:

> The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

Money received as capital is not taxable as income under this Amendment.

> It must be always remembered that taxation under the Sixteenth Amendment can only be on income as distinguished from capital, on the increment of wealth realized by its conversion or by its use in conjunction with labor and not on the original capital. (1)

> Contributions to capital are, of course, not taxable as corporate income. (2)

Unless money or other property received by a corporation is received as income, a corporation may not be compelled to pay income taxes thereon. Save in some unusual instances of no present concern, the question of whether a corporation is required to pay income taxes on money which it has received depends wholly on the status and character of the money at the instant of its receipt. This is fundamental and in most cases conclusively controls the question of whether income taxes must be paid thereon. It is of great importance therefore, to determine what is income. The Supreme Court of the United States has said:

> Income may be defined as the gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets ***. (3)

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* By L. S. Hulbert, Farm Credit Division, Office of the Solicitor, Department of Agriculture. Originally appeared in the January issue of News For Farmer Cooperatives published by the Farm Credit Administration.

(1) Commissioner of Internal Revenue v. Fleming, 82 F. 2d 324, 326.

(2) Carroll-McCreary Co. v. Commissioner of Internal Revenue, 124 F. 2d 303, 305.

(3) Eisner v. Macomber, 252 U.S. 189, 207; see also Lyeth v. Hoey, 20 F. Supp. 619; McKnight v. Commissioner of Internal Revenue, 127 F. 2d 527; Cheley v. Commissioner of Internal Revenue, 131 F. 2d 1018.

Unless money or other property received by a taxpayer is income, as the term is defined in the foregoing definition, income taxes may not be required to be paid thereon.

Receipts and income are not synonymous from the standpoint of income taxes. If a corporation sells stock at par for instance, in the amount of $100,000 the proceeds received by the corporation from such sales do not represent income, but capital, and no part thereof is liable for income taxes. (4)

Capital Not Income When Received

Regardless of how capital is acquired by a corporation, if it is capital, at the moment of receipt, it is not income from the standpoint of income taxes. In a case in which a landlord leased property for a term of years at a fixed rental and the lessee later, and without obligation to do so, voluntarily made permanent improvements thereon of substantial value, this enhancement in the value of the property did not constitute taxable income but an addition to capital. The Court said:

> But the power of the Congress to lay and collect taxes on income is confined to that which is actually and essentially income; and income, as thus used, means the gain derived from capital, from labor, or from both combined. The taxing power in respect to income cannot by legislative definition be extended beyond that scope. That which is not actually and essentially income cannot by definition be subjected to such a tax. * * *
>
> The improvements for which the lessee paid enhanced the value of the property, but the enhancement did not constitute realized income to the taxpayer during the years in question. It constituted an addition to capital instead of realized income within the meaning of the statute. Such an enhancement in value can result in realized income to the taxpayer only through increased rentals from the property after cancelation of the lease, or through the sale of the property. (5)

(4) Garden Homes Co. v. Commissioner of Internal Revenue, 64 F. 2d 593.

(5) Nicholas v. Fifteenth Street Co., 105 F. 2d 289, 290; see also Commissioner of Internal Revenue v. Wood, 107 F. 2d 869; M. E. Blatt Co. v. United States, 305 U.S. 267; but see Helvering v. Bruun, 309 U.S. 461.

It sometimes happens that stock of a corporation which is being paid for on the installment plan is forfeited because of a failure to make a payment. The question has arisen of whether the amount of such part payments which have been retained by a corporation on the forfeiture of the stock constitute income within the meaning of the Sixteenth Amendment. It has been consistently held that such partial payments do not constitute income. In one case it was said:

> We are of opinion * * * that the forfeited payments did not constitute "'income'" as the term has been defined; namely, gain derived from capital or labor, or from both combined. (6)

As a further illustration of how a corporation may receive money or other property, which does not have the status of income from the standpoint of income taxes, a case decided by the Supreme Court of the United States is of interest. The Government of Cuba paid subsidies aggregating $1,642,216.20 to a New Jersey railroad corporation. In holding that income taxes were not required to be paid on these subsidies, it was said:

> The subsidy payments taxed were not made for services rendered or to be rendered. They were not profits or gains from the use or operation of the railroad, and do not constitute income within the meaning of the Sixteenth Amendment. (7)

The Internal Revenue Code (8) provides that "The value of property acquired by gift, bequest, devise, or inheritance," shall not be included in gross income and shall be exempt from the payment of income taxes. This would appear to be a statutory recognition of the fact that property received in any of the ways specified would not be income and, therefore, that income taxes could not be required to be paid thereon.

Case in Point Cited

In a certain case (9) involving a mutual insurance company which was not exempt, each policyholder made what were termed "deposits"

(6) Commissioner of Internal Revenue v. Inland Finance Co., 63 F. 2d 886, 887; see also Realty Bond & Mortgage Co., 16 F. Supp. 771.

(7) Edwards v. Cuba Railroad, 268 U.S. 628, 633.

(8) 26 U.S.C.A. Sec. 22(b)(3).

(9) Jewelers' Safety Fund Soc. v. Edwards, 24 F. 2d 385.

with the company, from which the company was entitled to pay only operating costs and expenses and losses, and any amounts in excess thereof the company was under obligation to return to the policyholders on a proportionate basis. It was held that the company was essentially operating on an assessment basis and in view of the purposes for which each policyholder had made deposits, and as the company was under obligation to return at the end of the year any amounts that may have been deposited in excess of those required for the payment of operating costs and expenses and losses, the company, although not exempt, had no taxable income.

Frequently, stockholders of a corporation which is in need of additional capital, and particularly in instances in which the capital of a corporation has become depleted, make contributions of money to the corporation. This increases the book value of the stock and, of course, automatically operates to increase the working capital of the corporation. The regulations issued by the Bureau of Internal Revenue specifically provide that payments of the character in question do not represent income but contributions to capital and, hence, are not taxable. (10)

Income is Subject to Tax

All money received as income is subject to the payment of income taxes, while all money received as capital is free from liability for such taxes. It is true that income taxes are customarily required to be paid only on what is referred to as "net income", but under the Sixteenth Amendment there is no question but what income taxes could be required to be paid on gross income. In one case the Supreme Court of the United States declared:

> Unquestionably Congress has power to condition, limit or deny deductions from gross income in order to arrive at the net that it chooses to tax. (11)

And in another case it was said:

> Moreover, every deduction from gross income is allowed as a matter of legislative grace, and only as there is clear provision therefor can any particular deduction

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(10) Regulations 103 of the Bureau of Internal Revenue, Sec. 1922(a)-17.

(11) Helvering v. Independent Life Insurance Co., 292 U.S. 371, 381.

> be allowed . . . a taxpayer seeking a deduction must be able to point to an applicable statute and show that he comes within its terms.(12)

If money is received as income there is nothing that may be done by a taxpayer thereafter that will render such money free from liability for the payment of income taxes. The fact that money received as income is carried to reserves, regardless of how essential such reserves may be, will not cause the money to be nontaxable. Likewise, if money is received as income, the fact that it is subsequently treated and used as capital will not affect its taxable status.(13)

It is, of course, obvious that a corporation has "unfettered control" over capital and may employ it for any purpose intended to further the business in which the corporation is engaged. The fact that capital may have been received under conditions providing for its being revolved or for its retirement or for making adjustments therein in the event of impairment would not affect its status as capital.(14)

Distinction is Illustrated

A case(15) which well illustrates the distinction between money received as income and money received as capital is one which involved a corporation which had been organized to enable working men to acquire homes at cost. The corporation sold preferred stock to businessmen on which no dividends could be paid in excess of 5 per centum per annum and by means of money thus raised, supplemented with loans obtained from banks, constructed 105 homes. Before a working man could occupy one of these homes he had to subscribe for common stock in the corporation of a face value equal to the cost of the house and lot that he was to occupy, plus an amount for carrying charges. He was also required to sign a lease which obligated him to pay a monthly rental of a specified amount. All of the money received from the occupants of the houses

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(12) White v. United States, 305 U.S. 281, 292.

(13) Creasey Corporation v. Helburn, 57 F. 2d 204. See also: Cooperative Oil Association v. Commissioner of Internal Revenue, 115 F. 2d 666.

(14) See: Commissioner of Internal Revenue v. National Grange Mutual Liability Company, 80 F. 2d 316.

(15) Garden Homes Co. v. Commissioner of Internal Revenue, 64 F. 2d 593.

over and above operating costs and expenses and restricted dividends on the common and preferred stock were to be applied on the common stock subscriptions of each of the occupants of the houses.

The Bureau of Internal Revenue took the position that all dividends paid on the common and preferred stock, and all amounts over and above operating costs and expenses constituted taxable income in the hands of the corporation.

On appeal, however, the Circuit Court of Appeals for the Seventh Circuit held that the so-called dividends on the stock were, in view of all the facts and circumstances, simply interest, and that amounts which had been applied on the subscriptions for common stock were contributions to capital and, hence, were not taxable. In brief, the facts showed that the enterprise was one under which it was intended that the occupants of the 105 houses would eventually own all of the common stock in the corporation and that the preferred stock would be entirely retired, leaving the occupants of the houses in full control of the corporation which had title to the houses. Although the Court had to regard the dividends as simply interest, and although the parties had described the monthly payments as rent, the Court held that the corporation was not organized and operated for profit, and that, even though the corporation was not exempt from the payment of Federal income taxes "it received no profit within the meaning of the statute."

If the members of a cooperative association in their marketing contracts have authorized their association to deduct from the proceeds derived from the sale of their commodities certain amounts for capital purposes there would appear to be no basis for the view that such amounts are income from the standpoint of the payment of Federal income taxes. Clearly, a member may specify how money derived from the sale of his commodities shall be used. Of course, amounts which are thus furnished by the members of an association are usually evidenced in some appropriate way. Some associations issue capital stock to their members to evidence such deductions, other associations issue revolving fund certificates, while other associations in pursuance of provisions in their organization papers simply make appropriate entries in their books for the purpose of showing the capital contributions which have been made by each member. The status and character of such deductions is clear if the members specify in terms that they are authorizing the association to make deductions for capital purposes.

Sherman Anti-Trust Act - Group Health Association, Inc.

In 1937 Group Health Association, Incorporated, was formed in the District of Columbia as a non-profit organization by Government employees to provide medical care and hospitalization for its members and their families on a risk-sharing prepayment basis, for monthly dues paid by the members to the Association. The Association employed physicians in the District of Columbia on a full-time salary basis.

The American Medical Association and the Medical Society of the District of Columbia opposed the activities of the Association, apparently for economic reasons and because the Association functioned in a manner that was considered to be contrary to the ethics of the medical profession, and early in the life of the Association took action that was calculated to restrict its operations. As a result, the American Medical Association and the Medical Society of the District of Columbia, and 21 individuals, some of whom were officers or employees of either the Medical Association or the Medical Society of the District of Columbia, and certain physicians practicing in the District of Columbia, and two unincorporated associations, were indicted and charged with conspiracy to violate Section 3 of the Sherman Act by restraining trade or commerce in the District of Columbia. The defendants demurred to the indictment on the ground, among others, "that neither the practice of medicine nor the business of Group Health is trade as the term is used in the Sherman Act." This demurrer was sustained (United States v. American Medical Association, 20 F. Supp. 752). The case was then appealed to the Court of Appeals of the District of Columbia and this court reversed the District Court "holding that the restraint of trade prohibited by the statute may extend both to medical practice and to the operations of Group Health." (United States v. American Medical Association, 72 App. D. C. 12, 110 F. 2d 703.)

The case was then tried before a jury in the District Court. Certain of the defendants were acquitted by direction of the Judge, and all of the defendants, except the American Medical Association and the Medical Society of the District of Columbia, were found not guilty. An appeal was then taken to the Court of Appeals of the District of Columbia, which affirmed the judgments of conviction (American Medical Association v. United States, _____ App. D.C. _____, 130 F. 2d 233). The case was then carried by certiorari

to the Supreme Court of the United States, which also affirmed the judgments of conviction in American Medical Association v. United States, 317 U.S. _____.

The Supreme Court stated that it had granted the writ of certiorari on account of three questions:

> 1. Whether the practice of medicine and the rendering of medical services as described in the indictment are "trade" under § 3 of the Sherman Act. 2. Whether the indictment charged or the evidence proved "restraints of trade" under § 3 of the Sherman Act. 3. Whether a dispute concerning terms and conditions of employment under the Clayton and Norris-LaGuardia Acts was involved, and, if so, whether petitioners were interested therein, and therefore immune from prosecution under the Sherman Act.

The court held that it was unnecessary to decide the question of whether the practice of medicine constitutes a trade within the meaning of Section 3 of the Sherman Act because, in the opinion of the court, Group Health Association was clearly engaged in business or trade. In this connection the court said:

> Group Health is a membership corporation engaged in business or trade. Its corporate activity is the consummation of the cooperative effort of its members to obtain for themselves and their families medical service and hospitalization on a risk-sharing prepayment basis. The corporation collects its funds from members. With these funds physicians are employed and hospitalization procured on behalf of members and their dependents. The fact that it is cooperative, and procures service and facilities on behalf of its members only, does not remove its activities from the sphere of business.
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> If, as we hold, the indictment charges a single conspiracy to restrain and obstruct this business it charges a conspiracy in restraint of trade or commerce within the statute. As the Court of Appeals properly remarked, the calling or occupation of the individual physicians charged as defendants is immaterial if the purpose and effect of their conspiracy was such obstruction and restraint of the business of

Group Health. The court said: "And, of course, the fact that defendants are physicians and medical organizations is of no significance, for Sec. 3 prohibits 'any person' from imposing the proscribed restraints . . . " It is urged that this was said before this court decided Apex Hosiery Co. v. Leader, 310 U.S. 469. But nothing in that decision contradicts the proposition stated. Whether the conspiracy was aimed at restraining or destroying competition, or had as its purpose a restraint of the free availability of medical or hospital services in the market, the Apex case places it within the scope of the statute.

In regard to the question of whether the indictments charged, or the evidence proved, restraints of trade, the court stated that:

....the trial judge summarized the Government's claim that the evidence in the case showed opposition by the petitioners to Group Health and its plan; that they feared competition between the plan and the organized physicians and that, to obstruct and destroy such competition, the petitioners conspired with certain officers and members and hospitals to prevent successful operation of Group Health's plan by imposing restraints upon physicians affiliated with Group Health, by denying such physicians professional contact and consultation with other physicians, and by coercing the hospitals to deny facilities for the treatment of their patients. Again the judge charged: "Was there a conspiracy to restrain trade in one or more of the ways alleged?" And again: "If it be true . . . that the District Society, acting only to protect its organization, regulate fair dealing among its members, and maintain and advance the standards of medical practice, adopted reasonable rules and measures to those ends, not calculated to restrain Group Health, there would be no guilt, though the indirect effect may have been to cause some restraint against Group Health."

We need add but a word as to the sufficiency of the proof to sustain the charge. The petitioners in effect challenge the sufficiency, in law, of the

indictment. They hardly suggest that if the pleading charges an offense there was no substantial evidence of the commission of the offense. But, however the argument is viewed, we agree with the courts below that the case was one for submission to a jury. No purpose would be served by detailed discussion of the proofs.

The court specifically held that there was no dispute concerning terms and conditions of appointment under the Clayton and Norris-LaGuardia Acts and hence the defendants were not immune because of those acts from prosecution under the Sherman Act. In regard to this matter the court said in part:

> It seems plain enough that the Clayton and Norris-LaGuardia Acts were not intended to immunize such a dispute as is presented in this case. Nevertheless, it is not our province to define the purpose of Congress apart from what it has said in its enactments, and, if the petitioners' activities fall within the classes defined by the acts, we are bound to accord petitioners, especially in a criminal case, the benefit of the legislative provisions.
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> We think, however, that, upon analysis, it appears that petitioners' activities are not within the exemptions granted by the statutes. Although the Government asserts the contrary, we shall assume that the doctors having contracts with Group Health were employes of that corporation. The petitioners did not represent present or prospective employes. Their purpose was to prevent anyone from taking employment under Group Health. They were interested in the terms and conditions of the employment only in the sense that they desired wholly to prevent Group Health from functioning by having any employes. Their objection was to its method of doing business. Obviously there was no dispute between Group Health and the doctors it employed or might employ in which petitioners were either directly or indirectly interested.
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> In truth, the petitioners represented physicians who desired that they and all others should practice independently on a fee for service basis where whatever arrangement for payment each had was a matter that lay between him and his patient in each individual case of service or treatment. The petitioners

> were not an association of employes in any proper sense of the term. They were an association of individual practitioners each exercising his calling as an independent unit. These independent physicians, and the two petitioning associations which represent them, were interested solely in preventing the operation of a business conducted in corporate form by Group Health. In this aspect the case is very like Columbia River Packers Association, Inc., v. Hinton, 315 U. S. 143. What was there decided requires a holding that the petitioners' activities were not exempted by the Clayton and the Norris-LaGuardia Acts from the operation of the Sherman Act.

It should be noted that as the defendants were indicted under Section 3 of the Sherman Act, it was unnecessary to show that interstate commerce was involved, as the conspiracy related to the District of Columbia, and that act specifically makes illegal conspiracies in restraint of trade in the District of Columbia, over which Congress has complete jurisdiction.

In the Columbia River Packers Association case, referred to above, the Supreme Court of the United States held that an organization of independent fishermen was not a labor union within the meaning of the Norris-LaGuardia Acts, but on the contrary was an organization of independent operators. See Summary No. 14, page 1. In the anti-trust case of People v. Masiello, 31 N.Y.S. 2d 512, 518, where the question arose of whether an organization of news dealers was a "bona fide labor union" and hence entitled to an exemption accorded such unions, the court said:

> . . . For reasons similar to those upon which this court has predicated its holding that no "labor dispute" is involved here, the argument that defendants constitute a "bona fide labor union" must be rejected as unsound. The defendants are a trade association of retail merchants and not a bona fide labor union within any reasonable interpretation of that term.
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> The fact that many if not most of the defendants have small businesses cannot justify any differentiation between them and retail merchants conducting large businesses. The Donnelly Act is equally applicable to all persons and firms, whether large or small, who violate its provisions except bona fide labor unions and co-operative associations of farmers, gardeners or dairymen.

For a discussion of the case last cited see "Judicial Restrictions on Peaceful Picketing by 'Non-Labor' Groups", 51 Yale L.J. 1039.

The ruling of the court that the Group Health Association was engaged in business is unassailable. That a cooperative association which is functioning for the financial advantage of its members is engaged in business appears clear. And in several cases in which agricultural cooperative associations have been found amenable to involuntary bankruptcy proceedings, they have been held to be so engaged. Schuster v. Ohio Farmers Co-operative Milk Association, 61 F. 2d 337; In re South Shore Co-operative Association, 4 F. Supp. 772; In re Wisconsin Co-operative Milk Pool, 119 F. 2d 999, reversing 35 F. Supp. 787.

In contrast to the situation in United States v. Borden Company 308 U.S. 188 (see Summary No. 5, page 1), in which a cooperative milk association was indicted under the Sherman Act because it was alleged to have entered into agreements with third persons which restrained trade, Group Health Association, Inc., a cooperative, was protected by the Sherman Act from the defendants who had adopted courses of action which, if unchallenged, would have seriously hampered the organization.

The case of Driscoll v. East-West Dairymen's Association (Cal. App.) 122 P. 2d 379, holding that a bylaw relative to property rights and interests of members, and providing for a distribution to them on liquidation on the basis of such rights and interests, was valid, and that no distribution could be compelled at least under normal circumstances prior thereto, was discussed in Summary No. 16, page 1. Attention is called to the amplified and substitute opinion in this case found in 126 P. 2d 467.

Cooperative Liable for Personal Injuries

In the case of Leonard v. North Dakota Co-op. Wool Marketing Assn. (N.D.) 6 N.W. 2d 576, it appeared that the jury had rendered a verdict of $17,153.55 against the cooperative association on account of injuries sustained by the plaintiff when the automobile in which she was riding collided with an automobile owned by the association and which it was then claimed was being operated by its agent. The case was appealed to the Supreme Court of North Dakota and that court affirmed the judgment in favor of the plaintiff on condition that it be reduced from $17,153.55 to $12,000, or, in the event that the plaintiff was unwilling to file a remission for the amount of the verdict deemed to be excessive, the plaintiff had the option to have the case retried.

The association contended that the driver of the car owned by it was not acting as its agent at the time of the accident. The court did not so construe the evidence, and, in holding that the driver of the car of the association was its agent at the time, pointed out that the automobile was furnished by the association as a means of transportation for its field supervisor, Paul Groff.

> The corporation was engaged in buying wool. In carrying on its business it had agents in various parts of the state. Paul Groff had authority to appoint such agents with the approval of the general manager. The home office of the corporation was in Fargo. Paul Groff's name appeared on the stationery of the corporation as field supervisor. He had authority to buy wool and to issue drafts. The corporation furnished him the automobile involved in the accident and reimbursed him for travelling expenses. It honored a draft drawn by him on June 26. It paid him a salary until the end of June, 1940. For sometime prior to the accident, Paul Groff worked in the vicinity of Minot. He became ill while staying at a hotel in that city. His wife left Fargo and joined him at Minot during his illness. The wife's name is Esther. There is in evidence a telegram dated at Minot, North Dakota, June 25, 1940 which reads as follows:
>
> Esther will drive coupe home Woodrow unnecessary condition improved."
>
> The telegram bears the penciled notation in the handwriting of the manager "Phoned, advising we were sending man to drive car to Fargo."

The filing time at Minot is indicated as 10:23 P.M. The message was received in Fargo at 10:32 P.M. The record does not show when it was delivered although the manager admits receiving it. Woodrow is the son of the manager who testified that he intended to send the son to Minot to drive the car back to Fargo.

* * * * * * * *

The appellant strenuously contends that the record discloses no authority on the part of Paul Groff to delegate to another the right to drive the appellant's car or to employ a subagent to do so. However, the agency and authority of Mrs. Groff is not determined solely by this point. Paul Groff was ill and presumably unable to drive the car to Fargo. The inference may also be drawn from the record that the general manager of the appellant desired to have the car returned to Fargo. Groff and his wife also wanted to return to Fargo. The manager intended to send his son to Minot to drive the car back. When Groff learned this he telegraphed the manager that it would be unnecessary to send a driver to Minot for the car and that Mrs. Groff would drive it back. As matters then stood, this arrangement appeared to be mutually beneficial to all parties concerned. Mr. and Mrs. Groff would have transportation to Fargo and the appellant would have the car returned to its home office. After receiving the telegram the general manager made no further effort to communicate with his field supervisor. From these facts the jury might and no doubt did infer that the general manager acquiesced and agreed to the arrangement whereby Mrs. Groff became the driver of the car as the agent of the appellant. In view of these facts and the inference that the jury was entitled to draw therefrom the question of the agency and the authority of Mrs. Groff is one of fact for the jury and not a question of law for the court.

There is nothing in the opinion of the court to indicate whether the association, in the instant case, carried insurance to cover liability for damages due to the operation of its automobiles by its agents. Many associations carry such insurance and, generally speaking, it would appear to be highly advisable for them to do so.